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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-603

ALABAMA POWER COMPANY,
GEORGIA POWER COMPANY,
GULF POWER COMPANY and
MISSISSIPPI POWER COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and
RUSSELL E. TRAIN, as Administrator,
Respondents.

BRIEF OF THE PETITIONERS

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ENVIRONMENTAL PROTECTION AGENCY and
RUSSELL E. TRAIN, as Administrator,
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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is officially reported at 540 F. 2d 1114 (D. C. Cir. 1976).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 2, 1976. A Petition for Writ of Certiorari was filed within 90

days of that date and this Court granted the Petition on April 4, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act?

2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies power to reclassify federal and Indian lands within their jurisdiction?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Clean Air Act, 42 U.S.C. §§ 1857, et seq. (the Act) are set forth in the Addendum to this brief. The regulations of the United States Environmental Protection Agency (EPA) entitled "Prevention of Significant Air Quality Deterioration", 40 C.F.R. §§ 52.01 (d) and (f), 52.21, appear in the Appendix, A. 226a-291a.

STATEMENT OF THE CASE

This case involves the review of the authority for the promulgation by EPA of regulations entitled "Prevention of Significant Air Quality Deterioration", pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 1857, et seq. (the Act), which disapprove of state implementation plans adopted under the Act to the extent that such plans lack regulations for prevention of significant deterioration of air quality and promulgate revisions to such plans for portions of those states where air quality is better than the national primary and secondary air standards.

A. History of the Regulations

Pursuant to the Act, EPA established national primary and secondary ambient air quality standards for each air pollutant deemed to have an adverse effect on public health and welfare and for which air quality criteria were issued.[1] The primary air quality standards established pursuant to Section 109 of the Act are those standards which, allowing an adequate margin of safety, are requisite to protect the public health, and secondary standards are those which are requisite to protect the public welfare from any known or anticipated adverse effects of the specified air pollutants. Following the promulgation of these standards in 1971[2] and pursuant to Section 110 of the Act, each state promulgated a plan to implement, maintain and enforce the national standards and submitted such plan to EPA for approval. EPA initially approved all state implementation plans which complied with the requirements set forth in Section 110 (a) (2) of the Act.[3]

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[1]Section 108(a)(2) of the Act, 42 U.S.C. § 1857c-3(a)(2), provides that the Administrator must issue air quality criteria for each air pollutant which "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air in varying quantities." Section 109(a), 42 U.S.C. § 1857c-4(a), provides that the Administrator must promulgate national ambient air quality standards for each air pollutant for which air quality criteria are issued.

[2]40 C.F.R. Part 50, 36 Fed. Reg. 22384 (November 25, 1971).

[3]40 C.F.R. Part 52, 37 Fed. Reg. 2581 (February 3, 1972); Section 110(a)(2)(A)-(H), 42 U.S.C. § 1857c-5(a)(2)(A)-(H), sets forth the eight requirements of state implementation plans which are (1) provisions for the attainment of primary and secondary standards within certain time periods, (2) emission limitations, schedules and timetables for compliance with such limitations and such other measures to insure attainment and maintenance of such standards, (3) provisions for the establishment and operation of devices and procedures for monitoring and analyzing ambient air quality data, (4) procedures for reviewing the location of new sources to which the standards apply, (5) adequate provisions for intergovernmental cooperation, (6) assurance that the state will have adequate personnel, funding and authority to monitor and enforce compliance, and (7) pro-

Thereafter, the Sierra Club and others brought an action in the United States District Court for the District of Columbia seeking to require EPA to include a provision for the prevention of significant air quality deterioration in all state implementation plans. U. S. District Court Judge John H. Pratt, in refusing to accept EPA's interpretation of the Act, ordered the Administrator of EPA to disapprove state plans which failed to provide measures to prevent significant deterioration of air quality and to promulgate regulations providing for such prevention in each state plan. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972). This initial decision on the issue of significant deterioration was made in the procedural context of a preliminary injunction and thus was not a full and complete adjudication on the merits of the case. The decision was thereafter affirmed per curiam without opinion by the U. S. Court of Appeals for the District of Columbia Circuit. *Sierra Club v. Ruckelshaus*, C.A. No. 72-1528 (D.C. Cir. 1972) (per curiam) and affirmed by this Court in an equally divided decision without opinion. *Fri. v. Sierra Club*, 412 U.S. 541 (1973).[4]

In response to the Court's order, on July 16, 1973, EPA issued proposed regulations disapproving all state plans and providing four alternative provisions for prevention of significant air quality deterioration.[5] Following public com-

visions for modification of the plan to account for revisions in national ambient air quality standards or improved methods for achieving compliance.

[4]Under the precedents of this Court, an affirmance by an equally divided court is not authority on the legal principles involved for the determination of other cases. See, e.g. *Neil v. Biggers*, 409 U.S. 188, 191-193 (1972); *United States v. Pink*, 315 U.S. 203 (1942).

[5]38 Fed. Reg. 18986 (July 16, 1973); (A. 91a); In promulgating these regulations, EPA emphasized the impact of this scheme of air quality regulations:

"A national policy of preventing significant deterioration, however defined and implemented, will have a substantial impact on the nature,

ments and hearings, the Administrator on August 27, 1974, again proposed regulations providing for a revised plan for prevention of significant air quality deterioration.[6] The final regulations which are the subject of this action were issued on December 5, 1974.[7] Effective January 6, 1975, these regulations apply to "any new or modified stationary source" as defined under the regulations and which commences construction or expansion after June 1, 1975.[8]

The EPA regulations are designed to prevent significant deterioration in the quality of air by limiting increases in the concentrations of particulate matter and sulfur dioxide by applicable sources in areas where air quality in 1974 is better than the national ambient air quality standards.[9] Three classes of clean air areas are established. Class I and Class II areas are limited to maximum allowable incremental increases in sulfur dioxide and total suspended particu-

extent, and location of future industrial, commercial, and residential development throughout the United States. It could affect the utilization of the Nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods." Id.

[6]39 Fed. Reg. 31000 (August 27, 1974); (A. 160a).

[7]39 Fed. Reg. 42510 (December 5, 1975); (A. 206a). Clarifying amendments to these regulations were adopted on January 6, 1975 (40 Fed. Reg. 2802) (A. 242a), June 12, 1975 (40 Fed. Reg. 25004) (A. 246a); and September 10, 1975 (40 Fed. Reg. 42011) (A. 284a).

[8]40 C.F.R. § 52.21(d)(1) (1974) (A. 234a); The eighteen sources covered by these regulations include the following: (i) fossil-fuel steam electric plants of more than 1000 million B.T.U. per hour heat input; (ii) coal cleaning plants; (iii) Kraft pulp mills; (iv) Portland cement plants; (v) primary zinc smelters; (vi) iron and steel mills; (vii) primary aluminum ore reduction plants; (viii) primary copper smelters; (ix) municipal incinerators capable of charging more than 250 tons of refuse per 24-hour day; (x) sulfuric acid plants; (xi) petroleum refineries; (xii) lime plants; (xiii) phosphate rock processing plants; (xiv) by-product coke oven batteries; (xv) sulfur recovery plants; (xvi) carbon black plants (furnace process); (xvii) primary lead smelters; (xviii) fuel conversion plants.

[9]The majority of the lands of the United States have air which is cleaner than is required by the national ambient air standards. S. Rep. No. 94-717, 94th Cong., 2d Sess., 21 (1976).

late matter over baseline air quality.[10] Class III areas are limited by the national ambient air standards.[11] While all areas of the states are originally designated Class II, the states are permitted to propose redesignation of areas as Class I, II or III.[12] However, the Federal land managers and Indian governing bodies can propose redesignation of any of their lands to a more restrictive classification.[13] Further, the regulations can prohibit the construction of a new source which would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the state. "For example, a power plant which just meets the Class II increment for SO_2 could, under certain conditions, violate the Class I increment for SO_2 60 more miles away."[14] Thus the restrictions under these regulations go beyond the specific areas classified.

B. The Decision Below

Following the issuance of these EPA regulations, some 14 petitions seeking review were filed in various United States Courts of Appeal.[15] Those petitions which were not filed

[10]Id. at § 52.21(c)(2)(i) (A. 230a). The air quality increments for Class I and II areas are as follows:

Pollutant	Class I (g/m)	Class II (g/m)
Particulate matter:		
Annual geometric mean	5	10
24-hr maximum	10	30
Sulfur dioxide:		
Annual arithmetric mean	2	15
24-hr maximum	5	100
3-hr maximum	25	700

[11]Id. at 52.21(c)(2)(ii) (A. 230a).

[12]Id. at 52.21(c)(3)(ii) (A. 230a).

[13]Id. at 52.21(c)(3)(iv) and (v) (A. 231a-232a).

[14]39 Fed. Reg. 42510, 42512 (December 5, 1974) (A. 218a-219a).

[15]Petitions were filed separately by American Petroleum Institute, Montana Power Company, Sierra Club, The Dayton Power and Light Company, Public Service Company of Colorado, Utah Power and Light Company, State of New Mexico, Pacific Coal Gasification Company, Utah

in the District of Columbia Circuit were transferred to that Court, and the Court consolidated all of the cases. Among the petitions filed was a petition of the petitioners herein seeking to overturn these regulations.[16] The U. S. Court of Appeals for the District of Columbia Circuit, however, upheld the regulations, concluding that, in the legislative history of the Act, an understanding exists that the Act embodies a policy of non-deterioration of air cleaner than the national ambient air standards.[17] Thus the Court below reaffirmed its prior ruling without opinion in *Sierra Club v. Ruckelshaus* and concluded that no support exists for the proposition that Section 110 (a) (2) of the Act and its specific requirements for state plans were intended to limit the policy of non-deterioration in any way.[18]

The Court below relied upon the Air Quality Act of 1967 and its legislative history which it found to express a policy of non-deterioration and to be accepted and followed in the Clean Air Act of 1970.[19] This policy is said to be based upon the "protect and enhance" language contained in Section 101 (b) (1) of the Act. In so holding, the Court below found that the statutory basis for these regulations is the preamble of the Act which sets forth in general terms the

International, Inc., Indiana-Kentucky Electric Corporation, Buckeye Power Inc., Salt River Project Agricultural Improvement and Power District, as well as the petitioners herein. (A. 11a-33a).

[16]The petitioners herein, Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company, are subsidiary operating companies of The Southern Company and together constitute one of the nation's largest investor-owned electric utility groups. Their combined service area includes most of the states of Alabama and Georgia and areas of northwest Florida and southeast Mississippi. Because these companies are involved in the planning, construction and operation of electric power plants and are vitally interested in the future economic growth within this service area, they are concerned with and directly affected by the establishment and implementation of these regulations.

[17]*Sierra Club v. EPA*, 540 F. 2d 1114, 1127 (D. C. Cir 1976); (A. 55a).

[18]Id. at 1129; (A. 59a).

[19]Id. at 1124-1125; (A. 55a-58a).

statutory purposes of the Act.[20] The Court also concluded that these regulations are supported by the legislative history of the Act, even though it cited only one statement in a Senate Report on this legislation in support of its conclusion.[21] The Court found no support for these regulations in the substantive provisions of the Act. The Court also failed to attempt to reconcile the fact that EPA, when charged with implementing the Act, concluded that the Act did not require the implementation of a policy of non-deterioration.[22]

The Court below also rejected the industry petitioners' argument that this Court's decision in *Train v. Natural Resources Def. Council*, 421 U.S. 60 (1975), is inconsistent with a requirement that all state plans which fail to prevent significant air quality deterioration should be disapproved by EPA. In attempting to distinguish this decision, the Court stated that the *Train* decision concerned air pollution below rather than above national standards and the issue of non-deterioration was not considered.[23] Similarly, the Court below rejected this Court's decision in *Union Electric Company v. EPA*, 427 U.S. 246 (1976). The Court stated that this Court in *Union Electric Company* did not consider whether the "shall approve" language of Section 110 (a) (2) can "subvert the concomittant congressional directive that significant deterioration . . . be prevented."[24] In concluding that these cases are not controlling, the Court below refused to recognize this Court's adherence to the plain meaning of Section 110 (a) (2).

The Court below also refused to consider the industry and state government petitioners' argument that the authorization of Federal land managers and Indian governing bodies to propose redesignation of their lands under these regulations deprives the states of their authority under the Act. The Court concluded that this issue was not yet ripe for review because it could not "be certain how a conflict may evolve."[25] Thus the Court dismissed an issue which focused on a portion of the regulations which could result in a serious confrontation between state and federal authority over the regulation of air pollution within state geographical boundaries.

[20]Id.
[21]Id.
[22]See text accompanying notes 77-80 infra.
[23]Id. at 1128; (A. 64a).
[24]Id. at 1129; (A. 64a).

SUMMARY OF ARGUMENT

The substantive provisions of the Clean Air Act are unambiguous in their failure to authorize the establishment of regulations for prevention of significant air quality deterioration. Such regulations are inconsistent with the statutory scheme for the establishment and maintenance of national primary and secondary ambient air quality standards, which by definition, are designed to protect against all adverse effects of air pollutants. These regulations are also inconsistent with Sections 111 and 116 of the Act which are designed to insure protection of clean air areas to the extent desirable and necessary. Moreover, these regulations are inconsistent with the express provisions of Section 110 (a) (2) of the Act which do not require that EPA disapprove State implementation plans which fail to provide for prevention of significant air quality deterioration. This inconsistency has been confirmed by this Court in its recent decisions in *Train v. NRDC*, 421 U.S. 60 (1975), *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), and *Hancock v. Train*, 426 U.S. 167 (1976). These statutory provisions conclusively support a finding that the purposes clause of Section 101 (b) (1) is logically related to the express provi-

[25]Id. at 1139; (A. 86a-87a).

sions of the Act, Sections 108, 109 and 110 rather than an undefined policy of prevention of significant deterioration.

Even though a review of the legislative history of the Act is unwarranted, the lack of authorization for the regulations is further demonstrated by such history. The origins of the purposes clause, the Clean Air Act amendments of 1963 and 1967, were not based, even in part, on a policy of no-significant deterioration. The legislative history of these statutes demonstrates that this legislation was a product of Congress' concern over critically polluted areas, not clean air areas.

There is also no support in the legislative history of the 1970 amendments for the establishment of a policy for prevention of significant deterioration. There is no express reference to such a policy or requirement in any of the early legislation leading up to these amendments. To the extent that Congress was concerned in 1970 over protecting existing clean air, the legislative history shows that new source performance standards were designed to assure the maintenance of such clean air. In the absence of any clear recognition of such a policy or any reference to the establishment of a mechanism for prevention of significant air quality deterioration, it must be concluded that such a policy was not intended by Congress.

The contemporaneous interpretation by EPA of the Act's requirements further indicates that the implementation of such a policy was never considered until, under court order, EPA was forced to promulgate these regulations. Such administrative interpretation of the Act's requirements must be accorded great weight and supports a finding that these regulations are unauthorized and should be overturned.

Even assuming that regulations to prevent significant air quality deterioration are authorized under the Act, these regulations unlawfully infringe upon the authority of the

States under the Act. The States are expressly reserved the primary responsibility for assuring air quality within their boundaries and are authorized to establish substantive air control standards for both federal and non-federal sources of pollution. These regulations, by granting Federal land managers and Indian governing bodies the power to redesignate any lands which are subject to their jurisdiction, allow these authorities to effectively dictate the uses and growth potential of adjacent State and private land areas because of the drift restrictions of the Class I and Class II increments. These regulations thereby abrogate the states authority to determine to what extent the air emissions from such lands should be controlled. This conferral of authority to Federal land managers and Indian governing bodies is not authorized under the Act and should warrant this Court's vacating these regulations.

ARGUMENT

The Clean Air Act does not authorize the promulgation of regulations by the Environmental Protection Agency to prevent significant deterioration of air quality.

The preamble to the Clean Air Act Amendments of 1970, which is set forth in Section 101, includes the following recital of purpose among others:

> "[T]o protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the production capacity of its population."[26]

Notwithstanding the fact that there are over fifty substantive provisions which follow this statement of purpose, none of which refer to a requirement for "prevention of significant deterioration of air quality" the Court below con-

[26] § 101(b)(1), 42 U.S.C. § 1857(b)(1).

cluded that this statement in the preamble to the Act justifies EPA's establishment of regulations for prevention of significant deterioration. This conclusion is neither supported by nor consistent with the express provisions of the Act, its legislative history or the contemporaneous administrative interpretation of its requirements.

A. The Substantive Provisions of the Act do not authorize these Regulations.

The reliance by the Court below upon one statement of purpose in the Act as establishing a substantive mandate for prevention of significant deterioration is clearly a misplaced one. In the first place, a decision which is so central to the overall scope of the Act should obviously not hinge on one expression of purpose. As this Court has recognized, in determining the intent of Congress, consideration must be given *to the statute as a whole* or in its entirety, *not just to a single provision.*[27] Moreover, where the substantive provisions of a statute are clear and unambiguous, a preamble merely setting forth the purposes of a statute *cannot prevail* over those specific provisions.[28] Applying these long-standing principles, this Court must determine that the substantive provisions of the Clean Air Act support and are consistent with these regulations in order to warrant their being upheld. A review of these statutory provisions reveals numerous inconsistencies with any requirement for prevention of significant deterioration.

To begin, the substantive provisions of the Act are framed around a central element of air pollution control —

[27] *Richards v. U.S.*, 369 U.S. 1, 11 (1962); *U.S. v. American Trucking Associations, Inc.*, 310 U.S. 534, 594 (1940); *Helvering v. New York Trust Co.*, 292 U.S. 455, 464 (1934).

[28] *Carter v. Carter Coal Co.*, 298 U.S. 238, 290 (1936); *Hughes Tool Co. v. Meier*, 486 F. 2d 593, 596 (10th Cir. 1973); *Bissette v. Colonial Mortgage Corporation of D.C.*, 477 F. 2d 1245, 1246 (D.C. Cir 1973).

the national ambient air quality standards. By definition, the primary and secondary standards are established to provide comprehensive protection of the public health and welfare from *any and all adverse effects of air pollutants,* whether "known or anticipated."[29] Thus, assuming that these standards are achieved, no identifiable harm to air that is better than the national standards can be shown and accordingly, no "significant" effect can be proven. If any additional adverse effect from any air pollutant is discovered, the Act expressly provides that the national standards and air quality criteria should be revised to insure protection against such effect.[30] Accordingly, any additional substantive requirement for prevention of significant deterioration is inconsistent with the statutory requirements for the attainment and maintenance of the national standards.[31]

[29] § 109(b), 42 U.S.C. § 1857c-4(b) is as follows:

"(b)(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and *allowing an adequate margin of safety,* are *requisite to protect the public health.* Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is *requisite to protect the public welfare from any known or anticipated adverse effects* associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated." (Emphasis added).

§ 302(h), 42 U.S.C. § 1857(h) provides: "All language referring to *effects on welfare,* includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well being."

[30] § 108(a)(1) and (c), 42 U.S.C. § 1857c-3(a)(1) and (c); § 109, 42 U.S.C. § 1857c-4.

[31] Mr. William Ruckelshaus, former Administrator of EPA, has also pointed out that a non-deterioration policy does not make sense in the context of air quality standards which by definition protect against all adverse effects of pollution. *Hearings on the Implementation of the*

Secondly, Section 111[32] of the Act was purposefully established to protect existing air quality from pollution caused by the establishment of new sources of pollution in all areas including those where the air quality exceeds the national standards.[33] Section 111 (b) (1) authorizes EPA to promulgate standards of performance for new stationary sources of pollution. These standards must reflect "the degree of emission limitation achievable through the application of the *best system of emission reduction* which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."[34] Through this requirement, EPA can establish the most stringent standards feasible for new sources of pollution. To permit EPA to impose additional substantive requirements on new sources in order to prevent significant deterioration would completely obviate the need and purpose of Section 111.

Thirdly, to the extent that additional air quality protection is desired over and beyond that assured through the attainment of national standards and new source performance standards, Congress *specifically reserved for each state* through Section 116 of the Act the right to establish and enforce any more stringent air standards or limitations as it deems fit.[35] This right is also affirmed in Sections 101 (a) (3) and 107 (a) of Act wherein the Act provides that the *states shall have the primary responsibility for control of air pollution under the Act.* Accordingly, many states

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Clean Air Act Amendments of 1970 before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92nd Cong. 2d Sess. 273-274 (1972).

[32]§ 111, 42 U.S.C. § 1857c-6.

[33]For a discussion of the legislative history of Section 111, see *National Asphalt Pavement Assn. v. Train,* 539 F. 2d 775, 783 (D.C. Cir 1976); See also pages 24-27 infra.

[34]§ 111(a)(1), 42 U.S.C. § 1857c-6(a)(1).

[35]§ 116, 42 U.S.C. § 1857d-1.

have already taken steps to adopt regulations which go beyond attainment of national ambient air standards, including specific provisions to insure prevention of air quality deterioration.[36] Therefore, any substantive requirement for protection of air quality beyond that established pursuant to Sections 108, 109, 110 and 111 conflicts with Section 116 and renders the states discretionary authority under the Act illusory and meaningless. The implementation of an additional requirement for prevention of significant deterioration effectively destroys this statutory scheme.

Finally, the most glaring inconsistency between the Act and these regulations are the specific terms of § 110 (a) (2) of the Act. This Court has recently reaffirmed that EPA is required to approve any state implementation plan if it has been adopted after public notice and hearing *and* if it satisfies the eight specified conditions contained in Section 110 (a) (2). *Train v. NRDC,* 421 U.S. 60 (1975).

In the decision of *Train v. NRDC,* Justice Rehnquist spoke to this requirement:

> "Under § 110 (a) (2), the Agency is *'required'* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a state's choices of emission limitations if they are part of a plan which satisfies the standards of § 110 (a) (2) and the Agency may devise and promulgate a specific plan of its own only if a state fails to submit an implementation plan which satisfies those standards."[37]

More recently, this Court restated this conclusion in its opinion in *Hancock v. Train,* 426 U.S. 167 (1976):

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[36]38 Fed. Reg. 18986 (July 16, 1973), (A. 91a).

[37]421 U.S. 60, 79 (1975).

> "EPA was required to approve each state's implementation plan as long as it was adopted after public hearings and satisfied the conditions specified in § 110 (a) (2) ."[38]

In a subsequent opinion of Justice Marshall, in *Union Electric v. EPA*, 427 U.S. 246 (1976), this interpretation of Section 110 (a) was reiterated:

> "As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject to the States to strict minimum compliance requirements. These requirements are of a "technology-forcing character," Train v. NRDC, 421 U.S., at 91, and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.
>
> "This approach is apparent on the face of § 110 (a) (2) . *The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified,* Train v. NRDC, 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological or economic infeasibility."[39]

Therefore, following the precedent established by this Court, EPA is *not* authorized to disapprove state implementation plans which fail to provide for prevention of significant deterioration, since such a requirement is *not* included among the eight criteria of Section 110 (a) (2) . It is within

[38]426 U.S. 167, 169-170 (1976).

[39]427 U.S. 246, 257 (1976), (emphasis added).

the sole discretion of the states to establish requirements as part of State plans in addition to those specified in Section 110 (a) (2) .[40]

Notwithstanding the specific requirements of Section 110 (a) (2) , the Court below held that the *Train* and *Union Electric Co.* decisions were not controlling. The Court attempted to distinguish these decisions by stating that the issue of significant deterioration was not considered by this Court in those cases, nor was the issue of whether the "shall approve" language of Section 110 (a) (2) can be read to preclude a mandatory requirement for the prevention of significant deterioration. However, in making such distinctions, the Court below completely disregarded the express findings of those decisions.

In *Train*, this Court had to determine whether variances from state implementation plan requirements could be treated as "revisions" to state plans under Section 110 (a) (3) or could only be granted as postponements under Section 110 (b) . Following a thorough analysis of the Act and its legislative history, the Court found that Section 110 (a) (3) can be utilized for approval of variances so long as attainment of the national primary standards is not compromised. In addition, the Court specifically recognized that approval of variances as revisions to state plans under Section 110 (a) (3) could be made *only* if the plans otherwise satisfied the requirements of Section 110 (a) (2) .[41] This

[40]Congress' intent as to the requirements for State plans is further confirmed by subsequent legislation, Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246. In allowing EPA to notify states whose restrictions on fuel-burning stationary sources in their state plans may be relaxed without interfering with the attainment of national air quality standards, Congress reaffirmed that states are not required to provide for more stringent restrictions on air emissions than those necessary to insure attainment of the national standards. The States still maintain the discretion and authority to impose more restrictive conditions, if they so desire.

[41]421 U.S. 60, 98 (1975).

finding necessarily required the Court to decide what are the mandatory requirements for state plans which it found to be only the eight criteria set forth in Section 110 (a) (2).

Likewise, in *Union Electric Co.*, this Court also reviewed the requirements of Section 110 (a) (2). The issue in that case was whether the economic or technical infeasibility of a state plan should be considered by EPA upon its review of the plan. In resolving this issue, this Court had to decide the scope of EPA's responsibility in approving or rejecting a state plan. Upon a review of Section 110 (a) (2), it was determined that the language of this provision "provides no basis for the Administrator ever to reject a state implementation plan on the ground that it is economically or technologically infeasible."[42] It must logically follow, therefore, that Section 110 (a) (2) also provides no basis for EPA ever to reject a state implementation plan because it fails to provide for prevention of significant deterioration.

Without support among the substantive provisions of the Act and specifically Section 110, these regulations are due to be overturned regardless of the language contained in the preamble of the Act. However, in view of the statutory scheme established through Sections 108, 109, 110 and 111 of the Act, it seems much more reasonable to conclude that the purposes clause contained in Section 101 (b) (1) does not relate to prevention of significant deterioration but to the protection of public health and welfare through the national ambient air standards. By definition, these standards provide the necessary protection and enhancement of the quality of the air "so as to promote the public health and welfare and the productive capacity of [the Nation's] population." Only through this interpretation can the purposes clause be harmonized with the substantive provisions of the Act thereby avoiding any need for the resolution of a

[42]427 U.S. 246, 265 (1976).

conflict within the express provisions of the Act, a problem which Congress obviously did not intend to create.

B. The Legislative History of the Act does not support these Regulations.

Because the purposes clause of Section 101 (b) (1), as properly interpreted, does not conflict with the unambiguous substantive provisions of the Act, reliance upon the legislative history is not warranted.[43] Moreover, the legislative history of the Act cannot create a construction of the statutory provisions which is at variance with its plain words and meaning;[44] nor can a purpose be imputed to Congress through the legislative history which is not supported by the face of the statute itself.[45] Consequently, this Court should not feel compelled to review the legislative history of the Clean Air Act in order to determine whether prevention of significant deterioration is required. However, assuming that this Court may desire to review the full background of this Act so as to determine the legislative intent, the following review of the history of the Clean Air Act Amendments of 1970 and particularly the purposes clause, is submitted to demonstrate that a requirement for prevention of significant deterioration was never intended by Congress.

1. *The Purposes Clause of Section 101(b)(1)*

Upon reviewing the legislative history of the purposes clause contained in Section 101 (b) (1), the Court below

[43]*U.S. v. Oregon*, 366 U.S. 643 (1961); *U.S. v. Great Northern R. Co.*, 343 U.S. 562 (1951).

[44]*Kuehner v. Irving Trust Co.*, 299 U.S. 445 (1936).

[45]*Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 602 (1945); *Cheng Ho Mui v. Rinaloi*, 262 F. Supp. 258, 263 (DN.J. 1966); *United States Fidelity and Guaranty Co. v. Long*, 214 F. Supp. 307, 315 (D.OR. 1963); *U.S. v. One Solid Gold Object in Form of a Rooster*, 208 F. Supp. 99, 103 (D. NEV. 1962).

concluded that the origin of the "protect and enhance" language was the Air Quality Act of 1967.[46] The Court mistakenly overlooked the fact that the "protect" portion of that clause was first enacted as part of the Clean Air Act of 1963.[47]

Section 1 (b) (1) of the 1963 Act contained the following language:

> "(b) The purposes of the Act are —
> (1) *to protect* the Nation's air resources so as to promote the public health and welfare and the production capacity of its population; . . ."[48]

The legislative history of this Act indicates that Congress' intent was to completely revise the existing law by increasing federal authority over air pollution research, training and demonstration and over interstate pollution problems to a certain extent.[49] There were no statutory requirements included for the establishment of ambient air standards, merely the creation of federal authority for research and development of air quality criteria. The provisions for abatement of air pollution were specifically related to air pollution which "*endangers the health and welfare* of any persons."[50] Nowhere in these provisions or in the legislative history is there reference to a policy of non-deterioration or a concern over protection of air which is cleaner than that necessary to protect health and welfare.

The "enhance" portion of the purposes clause did, however, originate in the Air Quality Act of 1967.[51] This Act,

[46]Pub. L. No. 90-148, 81 Stat. 485.
[47]Pub. L. No. 88-206, 77 Stat. 392.
[48]Id. at § 1(b)(1), (emphasis added).
[49]1963 U.S. Code Cong. and Admin. News 1260, 1262 (1963).
[50]§ 5, Pub. L. No. 88-206, 77 Stat. 392; 1963 U.S. Code Cong. and Admin. News 455, 456 (1963).
[51]§ 101(b)(1), Pub. L. No. 90-148, 81 Stat. 485; H. Rep. No. 728, 90th Cong. 1st Sess. (1967); 1967 U.S. Code Cong. and Admin. News 1938, 1965 (1967).

which amended the Clean Air Act of 1963 and its amendments of 1965 and 1966,[52] also increased federal authority over air pollution control, while establishing a new procedure for states to adopt national standards and plans for achieving those standards:

> "Its provisions, however, increased the federal role in the prevention of air pollution, by according federal authorities certain powers of supervision and enforcement. But the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so."[53]

While the legislative history does not reveal any specific reason for the addition of the words "enhance the quality of" in the purposes clause, it could reasonably be assumed that the change related to some change in or addition to the substantive provisions of the Act. The most logical statutory change to which these words relate is that in Section 109 which was a newly enacted provision:

> "*Standards to achieve Higher Level of Air Quality*"
> Sec. 109 Nothing in this title shall prevent a State, political subdivision, intermunicipal or interstate agency from adopting standards and plans to implement an air quality program which *will achieve a higher level of ambient air quality* than approved by the Secretary."[54]

Because the word "enhance" has been defined as meaning "to make greater, intensify or increase,"[55] it could be reasonably concluded that Section 109 was intended to reaffirm

[52]Pub. L. No. 89-272, 79 Stat. 992; Pub. L. No. 89-675, 80 Stat. 954.
[53]*Train v. NRDC*, 421 U.S. 60, 64 (1975); See also, 1967 U.S. Code Cong. and Admin. News 1938 (1967).
[54]§ 109, Pub. L. No. 90-148, 81 Stat. 485 (emphasis added); 1967 U.S. Code Cong. and Admin. News at 530 and 1971 (1967).
[55]*Webster's New World Dictionary, College Edition* 482 (1957).

the States' discretionary right to establish more stringent ("greater") controls to achieve one of the Act's express purposes — to "enhance the quality of" the air.

Even if it is assumed that the addition of these words to the purposes clause was not related to any change in the statutory provisions, there is absolutely no indication in the legislative history of the 1967 Act that these words were intended to establish a mandate for prevention of significant deterioration. In fact, the legislative history of the 1967 Act shows that Congress' real concern was areas whose air would deteriorate below levels required to protect public health and welfare, that is, areas which were critically polluted:

> "The fact that an area is not now a problem area will not mean that controls will never be required. When the air quality of any region deteriorates below the level required to protect public health and welfare, the Secretary is required to designate that region for the establishment of air quality standards . . . It should be pointed out in this connection that the Public Health Service has expressed the view that every urban area of 50,000 or more population now has an air pollution problem."[56]

This passage strongly supports a finding that the 1967 Act did not deal with absolute protection of clean air areas for which a policy of non-deterioration would be designed.

In addition, it seems more likely that the word "protect", which has been defined as meaning "to shield from injury, danger or loss; guard; defend,"[57] would be related to prevention of the deterioration of clean air rather than the word "enhance". However, neither the Court below nor any party to this action has ever maintained that the 1963

[56]S. Rep. No. 90-403, 90th Cong., 1st Sess. 4 (1967).

[57]*Webster's New World Dictionary, College Edition* 1170 (1957).

Act, from which the "protect" language originates, embodies or requires the implementation of a policy for prevention of significant deterioration.

2. *The Substantive Provisions of the Act*

The Court below also concluded that a policy of non-deterioration of air quality was generally accepted at the time of the Clean Air Act Amendments of 1970. This was said to be shown by several ambiguous statements made by HEW officials during Senate Hearings and one passage from Senate Report No. 91-1196, which was considered out of context.[58] A complete review of the legislative history of the 1970 Act, however, demonstrates just the opposite.

The early legislative bills in 1970 which set forth amendments to the Act established a general framework for federally adopted national air standards, state plans to meet those standards, and new source emission controls, with the added recognition of the states' right to adopt more stringent requirements.[59] There was no mechanism established for implementing a so-called policy of prevention of significant deterioration. The House version of the 1970 Amendments, H.R. 17255,[60] which was introduced on April 27, 1970, also did not contain any provision for prevention of significant deterioration nor did it provide any requirement that state implementation plans include non-deterioration

[58]540 F. 2d 1114, 1125 (D.C. Cir 1976); (A. 56a-58a).

[59]The first Senate bill was introduced in December, 1969 by Senator Muskie and others. S. 3229, 91st Cong. 1st Sess. (1969). In early 1970, two identical bills were introduced with the support of the Nixon Administration. S. 3466, 91st Cong. 2nd Sess. (1970); H.R. 15848, 91st Cong. 2nd Sess. (1970). In addition, another bill was introduced by Senator Muskie in March, 1970. S. 3546, 91st Cong. 2nd Sess. (1970); See also, *A Legislative History of the Clean Air Act Amendments of 1970 (compiled for the committee on Public Works, U.S. Senate, by the Library of Congress)*, Vol. 2, p. 1451-1539 (1974) (hereinafter Leg. Hist.).

[60]H.R. 17255, 91st Cong., 2d Sess. (1970); 2 Leg. Hist. 910.

provisions. The House Committee Report on this bill indicates that control over existing and new pollution problems under this legislation was intended to be achieved through the national standards and new source emission standards and that any additional requirements would be left to the discretion of the States.[61]

Senate Bill 4358,[62] which was introduced on September 17, 1970 by Senator Muskie, also did not provide for the establishment of substantive requirements for prevention of significant deterioration. The Senate Committee on Public Works, upon reporting out this bill, stated that protection of existing clean air quality would be achieved under this legislation through provisions for national ambient air standards and new source standards:

> "Although the nature of the attack will differ from region to region, one objective will be the same: Air quality standards protective of the health of persons must be achieved within the 3-year period of the approval of plans to implement ambient air quality stan-

[61]H.R. Rep. 91-1146, 91st Cong., 2nd Sess. (1970); 2 Leg. Hist. 891-909. The right of the states to establish additional requirements under this legislation was emphasized by Rep. Staggers of West Virginia during the House debate:

> "Mr. Chairman, in response to the statement of the gentleman from New York (Mr. Farbstein), I might say any State can have *more stringent* ambient air quality standards *if they want to.* If a State plan is presented to the Secretary, to carry out such stricter standards I am sure it will be approved. I hope the gentleman is listening because no one is preventing any State from having stronger standards and a State plan designed to carry out such standards.
>
> "We would hope that this would take care of any State that says they have peculiar problems. We are not holding them back, but we say that all of the States must comply with the nationwide standards. We think that at the present time this is the best we can do. If any State wants stronger standards, we think it will know best what it should do and how far it should go. But if any State does not come up with a State plan to the satisfaction of the Federal Government then the Federal Government will step in and establish a plan for such State." 2 Leg. Hist. 807. (emphasis added).

[62]S. 4358, 91st Cong., 2nd Sess. (1970); 1 Leg. Hist. 531.

> dards. The right of States to set more stringent standards of air quality has been preserved. *Maintenance of existing high quality air is assured through provision for maximum control of new major pollution sources.*
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> • • •
>
> "The overriding purpose of this section [Section 113, Later 111] would be to prevent new air pollution problems, and toward that end, maximum feasible control of new sources at the time of their construction is seen by the committee as the most effective and, in the long run, the least expensive approach."[63]

In its report, the Senate Committee also referred to control over areas where existing air quality is better than the national standards (now known as primary standards) and goals (now known as secondary standards) :

> "The bill would not require the attainment of the air quality goals within a specified time period. Nevertheless, it is the Committee's view that progress in this direction should be made as rapidly as possible. In areas where air pollution levels are already relatively low, the attainment and maintenance of these goals should not require an extended time period. In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative. Given the various alternative means of preventing and controlling air pollution — including the use of the best available control technology, industrial processes, and operating practices — and care in the selection of sites for new sources, land use planning and traffic controls — deterioration need not occur."[64]

[63]S. Rep. 91-1196, 91st Cong. 2d Sess. (1970); 1 Leg. Hist. 402 and 416.
[64]Id. at 411.

This statement was relied upon by the Court below as giving "express recognition to the concept of non-deterioration."[65] However, the statement was extracted from a passage of the Senate Report dealing with the *attainment of air quality standards and goals* (now known as secondary standards). Considering the context in which this statement was made, it is much more logical that this statement means that the Agency (EPA) should ensure that air quality in areas where the air quality is equal to or better than the goals does not become worse than those goals (secondary standards) once they are established. Thus, given the prescribed methods for control under the Act, "deterioration need not occur." If, on the other hand, this statement were to be interpreted to mean that clean air must be kept from deteriorating at all *regardless* of the existence of the goals or any other method of control, it would be unnecessary to wait until the goals were established. This interpretation is clearly inconsistent with the scheme established by the express provisions of Senate Bill 4358.

During the Senate debate on Senate Bill 4358, Senator Muskie outlined the basic means of control over air pollution under these amendments: achievement of national ambient air standards, and goals (now secondary standards), achievement of national standards of performance by new sources, prevention of hazardous substance emission, and emission control of selected pollutants. Specifically, as to controls over new sources, Senator Muskie emphasized the following:

> "Third, the bill provided that newly constructed sources of pollution had to meet rigorous national standards of performance. While we cleaned up existing pollution, we were determined to *guard against new problems*. Those areas which have levels of air quality better than the national standards should not find their air quality *degraded* by the construction of new sources."[66]

[65] 540 F. 2d 1114, 1125 (D.C. Cir 1976); (A. 57a).

Senator Randolph and Senator Cooper expressed similar opinions about the new source standards of performance.[67] These statements strongly suggest that the new source standards were intended to protect existing clean air to the extent that Congress was concerned with such protection. There is absolutely no indication that Congress intended that states must also insure the prevention of significant deterioration through additional substantive requirements. In fact, it seems almost preposterous to suggest that Congress would intend such a requirement with its serious political and economic problems without giving express and detailed attention to it throughout the Congressional reports and debate.

The Conference Committee, upon consideration of House Bill 17255 and the Senate amendments to that bill, submitted its report but also *made no reference to a policy of or a substantive requirement for prevention of significant air quality deterioration.*[68] Also, during Senate consideration of Conference Report 91-1783, Senator Muskie and Senator Randolph reaffirmed that new source standards to be established under this legislation were intended to control new pollution problems by preventing degradation of existing air quality.[69] Neither Senator stated that the 1970 amendments would require States to prevent significant air quality deterioration.

[66] 1 Leg. Hist. 227, (emphasis added).

[67] 1 Leg. Hist. 289 (Senator Randolph); 1 Leg Hist. 260 (Senator Cooper).

[68] Conf. Rep. No. 91-1783, 91st Cong. 2d Sess. (1970); 1 Leg. Hist. 151-209.

[69] 1 Leg. Hist. 125 (Senator Muskie); 1 Leg. Hist. 144-145 (Senator Randolph).

The above-cited legislative history fully explains the absence of any statutory provision in the Act requiring states to provide for prevention of significant deterioration. Congress obviously did not intend to impose such a requirement for which it made no provision in the Act. Senator Baker, the ranking Republican Senator on the subcommittee which drafted the Senate Bill, has subsequently reaffirmed this fact:

> "I was on the subcommittee in 1967 when we came to terms with this and in 1970 with the clean air amendments and I stand subject to correction by the staff and other members if I am in error, but it is my recollection and it is my interpretation of the statute as passed that nondegradation is a term that was never embodied nor embedded in the statute itself."[70]

In addition, Congress has made repeated recent attempts to establish a precise framework for implementing a policy for preventing significant deterioration.[71] Several members of Congress have expressly recognized that the attempts to adopt this requirement are due to the lack of a policy of non-deterioration in the 1970 Act.[72] While these comments

[70] *Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong. 2d Sess. 275 (1972).

[71] During the previous session of Congress, both the Senate and the House passed bills which contained amendments to the Clean Air Act providing for prevention of significant air quality deterioration. S. 3219 and H.R. 10498, 94th Cong. 2d Sess. (1976). A compromise provision was reported out of Conference Committee on September 30, 1976, debated, but was not passed by Congress. The Senate and the House are presently considering new bills which also contain detailed provisions for prevention of significant air quality deterioration. S. 252, S. 253 and H.R. 4151, 95th Cong., 1st Sess. (1977).

[72] S. Rep. No. 94-717, 94th Cong. 2d Sess. (1976) at 105 (Senator Gravel) and at 118 (Senator McClure); H. Rep. No. 94-1175. 94th Cong. 2d Sess. (1976) at 445-446 (Rep. Satterfield) and at 488-489 (Reps. Devine, Broyhill, Carter, Brown, Skubitz, Collins and McCollister); 122 Cong. Rec. No. 112, at S. 12465 (Senator Baker); 122 Cong. Rec. No. 119, at H. 8296 (Rep. Rogers).

by members of Congress on subsequent legislation should not be used to determine the intent of the 1970 Act,[73] they do indicate the ongoing attempts of Congress to resolve this issue. In view of these recent efforts, it is imperative that this Court permit Congress to resolve the question of whether there should be requirements for prevention of significant air quality deterioration. As this Court has stated it:

> "Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest."[74]

Congressional action would certainly be far preferable to what could result in unwarranted "judicial legislation" if these regulations are permitted to stand.[75]

C. EPA's Contemporaneous Interpretation of the Act Does Not Support these Regulations.

The administrative interpretation of the Act must also be considered in deciding whether any statutory authority exists for these regulations, for as this Court has long recognized, great weight should be given to the interpretation given by the agency charged with its administration.[76] However, the Court below refused to recognize that EPA did not interpret the Act to require that states provide for prevention of significant air quality deterioration through their state plans, but only did so under court order.[77] In its initial regulations setting forth the requirements for state imple-

[73] *Watterman, S.S. Corp. v. U.S.*, 381 U.S. 252, 269 (1965).

[74] *Hancock v. Train*, 426 U.S. 167, 198 (1976).

[75] Justice Douglas, in following the words of Justice Holmes, recently stated that this Court should legislate only "interstitially" and that it is up to Congress to resolve issues which require "massive or molar action." *Saxbe v. Bustos*, 419 U.S. 65, 79-80 (1974).

[76] *Fry v. U.S.*, 421 U.S. 542 (1975); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974).

[77] *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972).

mentation plans, EPA gave its view of what should be required of states to insure protection of clean air areas:

> "In any region where measured or estimated ambient air levels of a pollutant are below the levels specified by an applicable secondary standard, the plan shall put forth a control strategy which shall be adequate to prevent such ambient pollutant levels from exceeding such secondary standard."[78]

This provision makes it clear that EPA did not deem it necessary to require states to do more under their State plans than insure the attainment and maintenance of secondary ambient air standards.

Even when it promulgated these regulations, EPA maintained its position that prevention of significant deterioration is not required under the Act:

> "In the absence of a definitive judicial decision on the issue, the Administrator adheres to the view that Section 110 of the Clean Air Act requires EPA to approve State implementation plans that will attain and maintain the national ambient air quality standards, and that *the Act does not require EPA or the States to prevent significant deterioration of air quality*. The proposed alternative regulations set forth herein would establish a mechanism for preventing significant deterioration pursuant to the preliminary injunction issued by the District Court."[79]

Mr. William Ruckelshaus, as Administrator of EPA during Congressional hearings in 1972 on the implementation of the Act, also stated that EPA did not interpret the Act to require prevention of significant deterioration.[80]

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[78] 40 C.F.R. § 51.12(b).

[79] 38 Fed. Reg. 18986 (July 16, 1973) (emphasis added); (A. 93a).

[80] *Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92nd Cong., 2d Sess. 272-275 (1972).

These statements when considered along with the specific provisions of the Act and their legislative history provide abundant support for this Court's finding that these regulations are unlawful and due to be overturned.

The Clean Air Act does not authorize the promulgation of regulations by the Environmental Protection Agency which grant to Federal land managers and Indian governing bodies power to reclassify Federal and Indian lands.

A. The Act authorizes the States to prevent and control air pollution within their boundaries.

As this Court recently recognized, the Clean Air Act of 1970 preserved the principle that "the prevention and control of air pollution at its source is the primary responsibility of State and local governments."[81] This principle is more explicitly stated in Section 107 (a) :

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . ."[82]

In *Train v. NRDC*, this Court in speaking to Section 107 (a) , also reaffirmed the role of the States in establishing state plans under the Act:

> "We also believe that Congress, consistent with its declaration that, "Each State shall have the primary responsibility for assuring air quality" within its boundaries, 107 (a) , left to the States considerable latitude in determining specifically how the standards would be met."[84]

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[81] *Train v. NRDC*, 421 U.S. 60, 64 (1975).

[82] § 107(a), 42 U.S.C. § 1857c-2(a).

[83] § 116, 42 U.S.C. § 1857d-1.

[84] *Train v. NRDC*, 421 U.S. 60, 86-87 (1975).

In *Union Electric Co. v. EPA*, upon determining that EPA is not required to consider the technological and economic feasibility of a state plan prior to approving it, the Court stated the following:

> "And it would permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution, even though *Congress plainly left with the States*, so long as the national standards were met, *the power to determine which sources would be burdened by regulation and to what extent*."[85]

Section 118 also confirms the States' authority under the Clean Air Act and their right to establish air quality standards for federal as well as non-federal sources of air pollution.[86] This statutory provision clearly obligates all federal installations and facilities to comply with the standards, limitations and compliance schedules established by the States under the Act. Thus, Section 118 is an extension of Congress' recognition of the States' authority and responsibility under the Act.

In the recent decision of *Hancock v. Train*, this Court emphasized that Congress, in adopting Section 118, intended to require federal installations "to abate their pollution *to the same extent* as any other air contaminant source and under standards which the *States* have prescribed . . ."[87] While holding that federal installations are not subject to state permit requirements, the Court affirmed that federal sources of pollution *are subject to the States authority to establish substantive requirements* under the Act for all sources of air pollution with a State's geographical boundary.

Considering the clear language of these statutory provisions and the decisions of this Court, EPA is not authorized

[85]*Union Electric Co. v. EPA*, 427 U.S. 246, 269 (1976) (emphasis added).
[86]§ 118, 42 U.S.C. § 1857f.
[87]*Hancock v. Train*, 426 U.S. 167, 198-199 (1976).

to infringe upon or limit in any way the States statutory powers and responsibilities under the Act.

B. EPA's Regulations for Prevention of Significant Deterioration Abrogate the Authority of the States under the Act.

Even assuming that these regulations are otherwise authorized by the Clean Air Act, the grant of authority to Federal and Indian authorities under these regulations is clearly unauthorized.[88] These regulations confer authority upon the States to propose the redesignation of all areas within a state to Class I, II or III.[89] Such redesignation is subject to approval by EPA.[90] In addition, however, Federal land managers are given the authority to propose redesignation of any Federal lands within a state to a more restrictive designation[91] and Indian governing bodies may propose redesignation of any Indian reservation over which a state has not assumed jurisdiction.[92]

Upon establishing these provisions, EPA gave the following explanation of its reasons for allowing Federal land managers and Indian governing bodies to retain such authority:

> "Various public comments indicate that Federal lands should be subject to State jurisdiction. EPA did not intend to preclude State redesignations provided that the Federal Land Manager can elect to keep the air quality over Federal lands in a more pristine condition

[88]The Court below refused to address this question because it found the issue to be "not yet ripe for review." 540 F. 2d 1114, 1139 (1976) (A. 86a).
[89]40 C.F.R. § 52.21(c)(3)(ii); (A. 230a); All areas were originally designated Class II under these regulations. Id. at § 52.21(c)(3)(i); (A. 230a).
[90]Id. at 52.21(c)(3)(vi); (A. 232a).
[91]Id. at 52.21(c)(3)(iv); (A. 231a).
[92]Id. at 52.21(c)(3)(v); (A. 232a).

than the State might designate. Therefore, the regulations have been revised to subject Federal lands to State redesignations but reserve to the Federal Land Manager the authority to subject such lands to a more stringent designation. This approach is consistent with section 118 of the Clean Air Act (42 U.S.C. 1857f) which requires that Federal agencies having jurisdiction over any property or facility meet substantive State air pollution control standards and limitations. There is nothing in the Clean Air Act or the legislative history of that Act that indicates the Congress intended to preclude the Federal Government from meeting more restrictive standards than are imposed by the States. This provision also ensures that national forests and parks can be protected by the Federal Government from deterioration of air quality."[93]

From this statement, it appears that EPA desires to insure that Federal and Indian authorities have the right to require more stringent air quality conditions for certain lands than the States might impose and therefore, in order to do this, Federal land managers and Indian governing bodies are allowed to redesignate their lands to a more stringent classification. If these regulations conferred limited authority upon Federal and Indian authorities to achieve *only* this purpose, which seems to be a reasonable one, there would be little disagreement with this part of the regulations, even though the Act does not speak to the right of any authority to establish for its facilities more stringent standards than the States may impose. However, these regulations go far beyond this proposition. Because the restrictions of a classification under these regulations *reach beyond the boundaries of the Federal and Indian area* so designated, the authority of the Federal and Indian officials thereby effectively extends into areas which are *exclusively* within the control and regulation of the States under the Act.

[93]39 Fed. Reg. 42510, 42513 (December 5, 1974); (A. 221a-222a).

The reality of this unlawful extension of authority is well illustrated by EPA in the preamble to these regulations:

> "Calculations have shown that because of the small air quality increments specified for Class I areas, *these levels can be violated by a source located many miles inside an adjacent Class II or III area.* For example, a power plant which just meets the Class II increment for SO_2 could under some conditions violate the Class I increment for SO_2 60 or more miles away. *Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State.* Therefore, wherever a Class I area adjoins a Class II or III area, the *potential growth restrictions,* especially for power plant development, *extend well beyond the Class I boundaries* into the adjacent areas. A similar situation exists, to a greater or lesser degree wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, *allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.*"[94] (Emphasis added).

The potential infringement upon State and private lands which are adjacent to Federal lands is well demonstrated by the fact that EPA has already expressly recommended that the vast Federal lands now utilized as national forests, parks

[94]Id. at 42512; (A. 218a-219a); EPA also recently proposed for public comment the approval of the redesignation of the Northern Cheyenne

and wildlife reserves be redesignated as Class I areas.[95] Because these Federal lands constitute large portions of many States and thus will limit air pollution many miles from their boundaries, the extension of Federal authority throughout these States will be overwhelming.

While the Act may not preclude Federal authorities from meeting more stringent air pollution controls than the States, there is substantial authority in the Act directing that the States, *and not the Federal government*, establish more restrictive requirements if necessary. Section 116 of the Act, as discussed *infra*, is devoted expressly to preserving the States' authority. These regulations unlawfully dilute the States' authority by allowing Federal land managers and Indian governing bodies to dictate the limits of air pollution within State geographical boundaries and, consequently, the growth and land uses well beyond those lands over which they have no jurisdiction. This obvious abrogation of State authority is contrary to the express mandates of the Act and for this reason, these regulations should be overturned.

Indian Reservation in Montana as a Class I area at the request of the Northern Cheyenne Tribal Council. This proposal recognizes that "facilities located near the reservation would violate the Class I increment within reservation borders." 42 Fed. Reg. 21819 (April 29, 1977)

[95]R. 9, *Technical Support Document, United States Environmental Protection Agency Regulations for Prevention of Significant Deterioration of Air Quality*, 19 (January, 1975); 38 Fed. Reg. 18986, 18993 (July 16, 1973) (A. 124a): ". . . It is anticipated that Zone I would normally be applied to those ultraclean areas such as national and state forests and parks, and other recreational areas in which it is desired to maintain essentially no deterioration of air quality."; 39 Fed. Reg. 42510 (Dec. 5, 1974) (A. 210a): "[T]here are some areas, such as national parks, where any deterioration would probably be viewed as significant."

CONCLUSION

For the foregoing reasons, petitioners request that the judgment of the Court below be reversed and that EPA's regulations for prevention of significant air quality deterioration be vacated as unlawful and unauthorized by the Clean Air Act.

Petitioners further request that, if the Court determines that these regulations are authorized under the Act, the provisions of these regulations conferring authority to Federal land managers and Indian governing bodies for the redesignation of certain lands be set aside as an unlawful abrogation of State authority under the Clean Air Act.

Respectfully submitted,

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ADDENDUM

RELEVANT PORTIONS OF THE CLEAN AIR ACT

Findings and Purposes

Sec. 101(a) The Congress finds

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, state, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

Air Quality Criteria and Control Techniques

Sec. 108.(a)(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b)(1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate

air pollution control agencies information on air pollution control techniques, which information shall include data relating to the technology and costs of emission control. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a) (1), which shall be comprised of technically qualified individuals, representatives of State and local governments, industry, and the academic community. Each such committee shall submit as appropriate, to the Administrator information related to that required by paragraph (1).

(c) The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section.

(d) The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

National Ambient Air Quality Standards

Sec. 109. (a) (1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days

after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1) (B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient aid quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Implementation Plans

Sec. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under Section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall

adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenace, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (c)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes privision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and anlyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standards or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(23) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of

paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources) and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

[PL 93-319, June 24, 1974]

(4) The procedure referred to in paragraph (2) (D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment of maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed.

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsecton (a) (2) (II).

If such State held no public association with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2) (A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required this section to achieve and maintain

national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

[PL 93-319, June 24, 1974]

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e) (1) Upon application of a Governor of a State at the time of submission of any plan implementating a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a) (2) (A) (i) for not more than

two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f)(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirements before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

(2)(A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearings, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307(a) (relating to subpoenas) shall be applicable to any proceding under this subsection.

Standards of Performance for New Stationary Sources

Sec. 111. (a) For purposes of this section:

(1) The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the applicaton of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term 'existing source' means any stationary source other than a new source.

(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within

such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purposes of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b) (1) (A) but (ii) to which a standard of performance

under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority.

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Retention of State Authority

Sec. 116. Except as otherwise provided in sections 119(c), (e) and (f), 209.211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementaton plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

Definitions

Sec. 302. When used in this Act—

(a) The term 'Administrator' means the Administrator of the Environmental Protection Agency.

(b) The term 'air pollution control agency' means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this Act;

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution;

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; or

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(c) The term 'interstate air pollution control agency' means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(e) The term 'person' includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

(f) The term 'municipality' means a city, town, borough, county, parish, district or other public body created by or pursuant to State law.

(g) The term 'air pollutant' means an air pollution agent or combination of such agents.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation,

manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.